No. 76-383

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN D. EHRLICHMAN, PETITIONER,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES F. C. RUFF
Special Prosecutor
Watergate Special Prosecution Force
315 9th Street, N.W.
Washington, D.C. 20530

PHILIP B. HEYMANN
PETER M. KREINDLER
Special Assistants to the Special Prosecutor

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QUESTIONS PRESENTED

1. Whether all elements of a violation of 18 U.S.C. § 241 were established where the government proved and the jury found beyond a reasonable doubt that the petitioner willfully and knowingly conspired to commit acts that constituted a plain violation of well-established Fourth Amendment rights and that the acts were committed for the purpose of invading the precise interests protected by those rights.

2. Whether government officials' entering the office and searching the files of a psychiatrist, without a warrant and in the absence of exigent circumstances, to secure confidential information on a patient, constituted a plain and undisputable violation of the Fourth Amendment, even if there were a national security justification, where the search and entry were not approved personally by the President or Attorney General.

3. Whether petitioner was deprived of a fair trial where the trial judge refused a transfer and continuance after determining, through individual questioning of prospective jurors, that it was possible to impanel a fair and impartial jury.

4. Whether petitioner was denied any discovery rights where no material or exculpatory evidence was withheld.

5. Whether petitioner was entitled to a severance where there was no substantial (and certainly no irreconcilable) conflict between his defense and those of his co-defendants.

6. Whether petitioner was entitled to process to compel the attendance of the President of the United States where the trial judge had propounded and the President had answered interrogatories on all relevant issues and the answers confirmed that the President's testimony would not be material.

STATEMENT

Petitioner was convicted after a jury trial in the United States District Court for the District of Co-

lumbia (Gesell, J.) of conspiring to violate the Fourth Amendment rights of Dr. Lewis J. Fielding by subjecting him to an unconstitutional search (18 U.S.C. § 241) and of making false material declarations to a grand jury (18 U.S.C. § 1623).[1] Petitioner was sentenced to serve from twenty months to five years imprisonment on each count, the sentences to run concurrently. The court of appeals affirmed (Pet. App. a1).

1. The Decision to Search Dr. Fielding's Office and Photograph His Private Files.

During the summer of 1971, following the publication of the Pentagon Papers, a decision was made to establish a unit in the White House, which later became known as the "Special Investigations" or "Room 16" unit, to investigate leaks of classified information (J.A. 360-61, 471, 512-13).[2] The unit was under the direct supervision of Egil Krogh and David Young, who reported to petitioner, then Assistant to the President for Domestic Affairs (J.A. 430-32, 471-72). It also was staffed, with the knowledge and approval of petitioner, by G. Gordon Liddy, a former FBI agent, and E. Howard Hunt, a former

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[1] Petitioner was convicted on two counts charging the making of false statements and acquitted on a third by the jury. The district judge granted petitioner's motion for a judgment of acquittal on a count charging him with making false statements to agents of the Federal Bureau of Investigation ("FBI") after the jury had returned a verdict of guilty.

[2] "J.A." refers to the Joint Appendix of petitioner and the United States in the court of appeals.

Central Intelligence Agency ("CIA") agent (J.A. 472, 509-13).

By July 1971, the unit had focused its activities on acquiring all possible information on Daniel Ellsberg, the suspected source of the Pentagon Papers leak (J.A. 362). As petitioner was informed, this included a decision to have the CIA prepare a psychological profile on Ellsberg (J.A. 665-69; G.X. 5, 6).[3] The unit also decided to try to obtain access to Ellsberg's private medical records, but Dr. Lewis J. Fielding, a psychiatrist who had treated Ellsberg, refused to be interviewed by the F.B.I. because of the doctor/patient privilege (Ellsberg's psychiatric records were sought to aid the CIA in developing its psychological profile to be available for public release, if necessary, to destroy Ellsberg's image.) (J.A. 289-301, 364-65, 433-34, 460-62, 473.)

In view of Fielding's refusal to talk to FBI agents, Hunt proposed to Krogh and Young that they carry out a "bag job" or "surreptitious entry" to obtain Ellsberg's psychiatric records (J.A. 366). Because Krogh and Young did not believe they had authority to approve such an operation, they raised the question with Ehrlichman on August 5. Ehrlichman was told that the FBI had been unsuccessful in interviewing Fielding and that, if the unit were to gain access to Fielding's files, it would have to conduct a covert or clandestine operation of its own.

[3] "G.X." refers to Government Trial Exhibit.

(J.A. 434A-34C, 463, 475-78, 967-69). Petitioner wanted to think about the proposal (J.A. 434B-480).

Shortly thereafter, the unit received the CIA's preliminary profile, which it considered superficial and unsatisfactory (J.A. 373, 435, 480). As a result, Krogh and Young recommended to petitioner "that a covert operation be undertaken to examine all the medical files still held by Ellsberg's psychoanalyst covering the two-year period in which he was undergoing analysis." The recommendation was followed by the words "Approve" and "Disapprove", each followed by a blank to permit petitioner to indicate his decision. Petitioner placed his initial "E" in the blank following the word "Approve" and wrote in the space below: "if done under your assurance that it is not traceable" (J.A. 681-82; G.X. 13).

2. Preparations for the Entry, Final Approval and the Break-In.

After receiving petitioner's approval, Krogh and Young instructed Hunt and Liddy to proceed with a feasibility study on the condition that the actual entry be conducted by persons who were not in the direct or indirect employ of the White House (J.A. 369-71, 484). Hunt recruited Bernard Barker, who had worked for him during the Bay of Pigs operation while Hunt was with the CIA, and (through Barker) Eugenio Martinez and Felipe De Diego to comprise the entry team (J.A. 374-79, 426). Hunt and Liddy subsequently went to California to con-

duct their feasibility study, gaining access to Fielding's offices through false pretenses to take reconnaissance photos (J.A. 382-90).

Meanwhile, Krogh and Young sent petitioner memoranda keeping him fully informed about all aspects of the Ellsberg investigation. These included a list of "Items to Discuss with Mr. Ehrlichman—August 23, 1971" in connection with a meeting with Ehrlichman on that date. "Special Project No. 1," which referred to the plan to examine the files of Ellsberg's psychiatrist, was the first item on that list. (J.A. 685, 441-43, 470, 508; G.X. 15, 16.) On August 25, 1971, Krogh and Young succinctly notified petitioner that "Hunt and Liddy have left for California" (J.A. 683-84; G.X. 14).

The following day Young sent petitioner another memorandum referring to the plan to examine Fielding's files and indicating that the fruits of the entry were to be used as part of a plan "to bring about a change in Ellsberg's image." The latter memorandum stated that "we have already started on a negative press image for Ellsberg" and added that "[i]f the present Hunt/Liddy Project #1 is successful, it will be absolutely essential to have an overall game plan developed for its use in conjunction with the Congressional investigation." (J.A. 686-91; G.X. 17.) Following Young's suggestion, Ehrlichman sent Charles Colson, Special Counsel to the President, a memorandum entitled "Hunt/Liddy Special Project #1" and stating: "On the assumption that the proposed undertaking by Hunt and Liddy would be carried out, and would be successful, I would appreciate receiving from you by next Wednesday a game plan as to how and when you believe the materials should be used" (J.A. 692-522; G.X. 18).[4]

On August 31, Krogh and Young called petitioner, who was vacationing at Cape Cod, to secure final approval for the operation. They told him that the investigators had returned from California and felt that the operation could be conducted with all conditions met. When both Krogh and Young said that they should go ahead with the operation, petitioner gave his approval and asked to be informed if anything substantial was discovered. (J.A. 447-49, 491-93).[5]

On the night of September 3, Barker, Martinez and De Diego broke into Dr. Fielding's offices and rifled through his locked file cabinets, but failed to locate Ellsberg's records. They left pills and materials strewn about the office to make the break-in appear to be the work of addicts searching for drugs. (J.A. 398-401, 416-21.)

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[4] Petitioner also arranged for Colson to obtain $5,000 in cash from private sources to finance the operation.

[5] Petitioner asserts that it is "uncontroverted from the record that [he] never contemplated any type of entry . . ." (Petition, p. 14). The district court's instructions, however, required the jury to find that petitioner knowingly joined the conspiracy aware that its purpose was to carry out a warrantless entry and search of Dr. Fielding's office. Petitioner did not challenge this aspect of the court's instructions. Moreover, he did not contest the sufficiency of the evidence in the court of appeals, nor does he do so here.

3. Petitioner's Efforts to Conceal His Involvement.

A year and a half later, in March 1973, Hunt, who had been convicted in the Watergate break-in, threatened to reveal White House responsibility for the Fielding break-in (J.A. 498-501). In response, petitioner removed two memoranda incriminating him from the official files maintained by Young and placed them in his own separate, personal files on the stated ground that they showed "too much forethought" (J.A. 452-57, 465-66). These memoranda subsequently were located in a box of petitioner's files stored at the White House during a search of White House files conducted at the request of the Special Prosecutor's office (J.A. 558-59, 561-64).

In May, when petitioner was not aware that copies of the incriminating documents were available to the prosecutors, he testified before a federal grand jury that prior to the Fielding break-in, he knew nothing about either an attempt to get information for a psychological profile on Ellsberg or any effort to obtain information from Ellsberg's psychiatrist. Only when petitioner later learned from a newspaper account that Young had kept copies of the memoranda removed from the unit's official files, did he change his account, acknowledging that he had known of these matters before the break-in, but claiming that he had forgotten between that time and the time he read the newspaper account.[6] (J.A. 706-32.)

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[6] Petitioner told FBI agents on May 1, 1973, that it had been over a year since he had seen anything on the White House investigation of the Pentagon Papers case, even though he had reviewed the files only five weeks earlier (J.A. 552-57, 704-05).

ARGUMENT

I. THE GOVERNMENT SUSTAINED ITS BURDEN OF PROVING ALL ELEMENTS OF A VIOLATION OF 18 U.S.C. § 241, AND PETITIONER WAS NOT PRECLUDED FROM PROVING ANY RELEVANT DEFENSE

The crux of petitioner's challenge to his conviction for conspiring to violate Dr. Fielding's Fourth Amendment rights is his contention that the district court, through both its restrictions on the admission of evidence and its instructions to the jury, improperly prevented him from establishing that he had a good faith belief that he had the authority lawfully to approve the warrantless entry and search of Dr. Fielding's office in order to obtain foreign intelligence information. He asserts that such a belief, even if contrary to well established law, constitutes a valid defense to prosecution under 18 U.S.C. § 241 because it precludes a finding of specific intent. He makes this argument despite his trial testimony characterizing the entry as illegal and his actual defense, which was grounded solely on the claim that he knew nothing about the entry in advance (J.A. 622, 644-45).

Section 241 makes it a crime for "two or more persons [to] conspire to injure . . . any citizen in the . . . enjoyment of any right . . . secured to him by

the Constitution or laws of the United States." As the court of appeals held, the district judge properly concluded that the specific intent required under this section is merely "the purpose of the conspirators to commit acts which deprive a citizen of interests in fact protected by clearly defined constitutional rights." It is not necessary that the defendant subjectively believe or be aware that he is violating those rights (Pet. App. a23).

The district judge determined that the warrantless entry and search constituted a plain and indisputable violation of the Fourth Amendment. He rejected the claim that members of the White House staff, without the approval of the President or the Attorney General, may order the warrantless search of a home or office in the name of national security. Thus, the district judge necessarily and correctly excluded evidence of alleged "national security" circumstances surrounding the break-in. The district judge's instructions to the jury accurately described the four elements of the offense. He told the jury that the prosecutor must prove beyond a reasonable doubt: (1) that there was a conspiracy (which petitioner knowingly joined); (2) that the purpose of the conspiracy was to carry out a warrantless entry and search of Dr. Fielding's office without his permission; (3) that the conspirators were governmental employees or agents who intended to enter and to search Dr. Fielding's office without warrant or permission for governmental rather than purely personal reasons; and (4) that Dr. Fielding was at the time an American citizen (J.A. 657-58).

A. The Element of Specific Intent Under Section 241

In an ordinary conspiracy the government need only prove that the defendants agreed and specifically intended to do all the acts proscribed by statute. *See, e.g., United States* v. *Feola*, 420 U.S. 671, 696. This Court, however, has added two additional elements to the specific intent requirement in a prosecution under Section 241: first, the constitutional right violated must be well-established and plainly applicable; and second, the defendants must specifically intend and agree to invade for governmental and not private purposes the federal interests protected by the right in question. These elements respond to two concerns —first the need for fair warning because of the danger of vagueness under Section 241 arising from shifting conceptions of constitutional principles and, second, considerations of federalism.

Screws v. *United States*, 325 U.S. 91, 104, the seminal case, held that a civil rights prosecution may be maintained only where the federal right violated has been "made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." *See also, United States* v. *Guest*, 383 U.S. 745, 753, 754 (applying Screws to Section 241). This requirement precludes any claim that Section 241 is unconstitutionally vague because it incorporates rights subject to evolving interpretation. There is no problem of fair warning if the section is limited to constitutional rights that are plainly applicable in the situation confronting the defendant and well-established prior to his actions.

The second requirement—that one object of the conspiracy must be to deprive the citizen-victim of interests protected by a federally defined right—restricts the reach of Section 241 to the limited federal interests in the area. The concern of Congress in enacting Section 241 was to extend the federal police power to those who intentionally interfere with federally protected interests—for example, police officials whose specific intent is to carry out the governmental purpose of searching private premises, or individuals who act with the purpose of preventing other citizens' use of interstate highways. The section was not intended to reach crimes that traditionally are a matter of state concern—for example, individuals who burglarize a doctor's office for personal gain, but also happen to be government agents. Nor does Section 241 apply to robbers who by happenstance rob a person in the course of travel from one state to another, although the robbery in fact interferes with interstate commerce. *See Screws* v. *United States*, *supra*, 325 U.S. at 106; *Anderson* v. *United States*, 417 U.S. 211, 223.

As the court of appeals summarized, "[i]f both requirements are met, even if the defendant did not in fact recognize the unconstitutionality of his act, he will be adjudged as a matter of law to have acted 'willfully'—*i.e.*, 'in reckless disregard of constitutional prohibitions or guarantees'" (Pet. App. a20). There never has been a requirement that the defendant must be thinking in constitutional or legal terms when he commits the acts that constitute the

basis of the violation. This conclusion is not only consistent with, but is mandated by *Screws*. In discussing why the indictment in *United States* v. *Classic*, 313 U.S. 299, charging a civil rights violation arising from the willful alteration of ballots, satisfied *Screws*' delineation of the element of specific intent, the Court said (325 U.S. at 106):

> Such a charge is adequate since he who alters ballots or without legal justification destroys them would be acting willfully in the sense in which [§ 242] uses the term. *The fact that the defendants may not have been thinking in constitutional terms is not material* where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution. When they so act they at lease act in reckless disregard of constitutional prohibitions or guarantees. (Emphasis added).

See also, *Williams* v. *United States*, 341 U.S. 97, 101-02; *United States* v. *Guest*, *supra*, 383 U.S. at 753-54, 758; *Anderson* v. *United States*, *supra*, 417 U.S. 211, 226.

Assuming that the warrantless entry and search of Dr. Fielding's office constituted a plain and indisputable violation of the Fourth Amendment, it was thus irrelevant that petitioner may have had a good faith belief that it was not unconstitutional. This is hardly a startling or novel proposition. A mistake of law never has been considered a defense to a criminal violation where the offense is *malum in se*. *See, e.g.*, *United States* v. *International Minerals & Chem-*

ical Corp., 402 U.S. 558, 563; *Dennis* v. *United States*, 171 F.2d 986, 990 (2d Cir. 1948), *aff'd*, 339 U.S. 162; and Pet. App. a23-24. Neither *Screws* nor its progeny vitiate this traditional and salutary principle.[7]

B. The Entry and Search Constituted a Plain and Indisputable Violation of the Fourth Amendment

The district judge ruled as a matter of law that at the time of the entry and search, it was plainly established that concerns of national security did not excuse the failure to obtain a judicial warrant for a physical search, both because any exemption from normal warrant requirements that may exist in the case of electronic surveillance must be invoked personally by the President or Attorney General on a case-by-case basis, and because such an exemption does not cover physical searches even when invoked by one of these officials. Pretermiting the question whether there is any foreign intelligence exception to the warrant requirement for physical entries and searches, the court of appeals held that "in any event the 'national security' exemption can only be invoked if there has been a specific authorization by the President, or by the Attorney General as his chief-legal

[7] Petitioner's reliance on *Pierson* v. *Ray*, 386 U.S. 547, is misplaced. Petitioner cannot claim to have been misled by a statute, court decision or other formal statement of law. As we discuss below, the violation of the Fourth Amendment was clear and well-established; there could have been no reasonable mistake about the illegality of the plan to enter and search Dr. Fielding's office.

advisor, for the particular case" (Pet. App. a29-30). This was clear in 1971, as it is now. As the court of appeals explained (Pet. App. a30):

> No court has ever in any way indicated, nor has any Presidential administration or Attorney General claimed, that any executive officer acting under an inexplicit Presidential mandate may authorize warrantless searches of foreign agents or collaborators, much less the warrantless search of the offices of an American citizen not himself suspected of collaboration.

This is clearly correct. In 1967, four years before petitioner conspired to search Dr. Fielding's office without a warrant, this Court reiterated "one governing principle, justified by history and by current experience," that consistently had been followed in interpreting the Fourth Amendment "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara* v. *Municipal Court*, 387 U.S. 523, 528-29.[8] What case law exists strongly

[8] It is beyond dispute that the dark-of-the-night entry and search, which was planned meticulously for weeks in advance, did not fall within any of the "few specifically established and well-delineated exceptions" to the warrant requirement. *Katz* v. *United States*, 389 U.S. 347, 357.

This was not a search incident to a lawful arrest, *Chimel* v. *California*, 395 U.S. 752; nor was it a seizure of evidence in "plain view" of police officers, *Harris* v. *United States*, 390 U.S. 234; finally, this was not a search that falls within the ambit of "hot pursuit" or other "exigent circumstances" that require immediate action in order either to protect the

suggests that the warrant requirement to search a citizen's home or office and seize his confidential papers is fully applicable even in foreign intelligence cases. *See, Abel* v. *United States*, 362 U.S. 217, 226, 236-40; *United States* v. *Coplon*, 185 F.2d 629, 635 (C.A. 2). *See also, United States* v. *United States District Court*, 407 U.S. 297, 313, discussing the historical foundation for the Fourth Amendment, including the cases of John Entick and John Wilkes, which struck down governmental claims of unregulated power to search for evidence of treason and sedition.

Mr. Justice White, concurring separately in *Katz* v. *United States*, *supra*, 389 U.S. at 364, first raised the possibility that a warrant might be dispensed with for electronic surveillance, *but only* if "the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable." The same carefully limited possibility that *personal authorization* or the President or Attorney General might substitute for a judicial warrant in a wiretap case relating to "foreign intelligence" was noted by Justice Stewart concurring in *Giordano* v. *United States*, 394 U.S. 310, 314-15. Similarly, in passing the Omnibus Crime Control and Safe Streets Act of 1968,

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safety of law enforcement personnel, or to prevent escape or the destruction of evidence. *See e.g., Warden* v. *Hayden*, 387 U.S. 294; *Schmerber* v. *California*, 384 U.S. 757; *Carroll* v. *United States*, 267 U.S. 132.

Congress avoided deciding whether the President had power to wiretap without a warrant in national security cases, but expressly provided that if any such information were to be received in evidence, it had to be "intercepted by authority of the President." 18 U.S.C. § 2511(3). Far from creating any ambiguity, these precedents, all predating the Fielding break-in, explicitly confirmed that there is no "national security" exception to the warrant requirement where there is no personal approval of the search by the President or Attorney General.[9]

Thus, the court of appeals was certainly correct in concluding that the "law is plain that the simple fact that the President asks a subordinate official to investigate and report on a problem involving national security [all that was asserted as a factual matter by petitioner at trial] does not give the official plenary power to exercise all prerogatives the President might have in that area" (Pet. App. a34.)[10] The court of appeals succinctly and cogently

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[9] The court of appeals summarizes the historical position of the Executive Branch. Presidential memoranda setting forth Executive policies regarding national security electronic surveillance have emphasized the requirement of personal approval by the President or Attorney General. (Pet. App. a32-33.) Also, in its brief (p. 11) in *United States* v. *United States District Court*, *supra*, 407 U.S. 297, the government urged this Court to adopt the principle suggested by Mr. Justice White in *Katz*.

[10] *United States* v. *Barker* (Pet. App. G), to which petitioner repeatedly refers, is not in conflict with the decision of the court of appeals. *Barker* was a 2-1 decision, with no majority opinion, of the same panel of the court below, re-

explained the policy underlying the conclusion (Pet. App. a31):

> The defendant totally misapprehends the critical role played by the President and the Attorney General, when the "national security" exception is invoked. It is argued that this exception gives government officials the power surreptitiously to intrude on the privacy of citizens without the necessity of first justifying their action before an independent and detached member of the judiciary. Unless carefully circumscribed, such a power is easily subject to abuse. The danger of leaving delicate decisions of propriety and probable cause to those actually assigned to ferret out "national security" information is patent, and is indeed illustrated by the intrusion undertaken in this case, without any more specific Presidential direction than that ascribed to Henry II vexed with Becket. *As a constitutional matter, if Presidential approval is to replace judicial approval for foreign intelligence gathering, the personal authorization of the President—of his alter ego for these matters, the Attorney General—is necessary to fix accountability and centralize responsibility*

versing the convictions of petitioners co-defendants Barker and Martinez. Unlike petitioner, Barker and Martinez could have believed that Hunt, who had recruited them on behalf of the White House, had proper White House authorization for the operation, including presidential approval.

Similarly, the *discretionary* decision of the Department of Justice not to prosecute former CIA Director Helms hardly establishes that it was reasonable for petitioner to believe "that searches of this nature were within the ambit of his authority" (Petition, p. 26).

> *for insuring the least intrusive surveillance necessary and preventing zealous officials from misusing the President's prerogative.* (Emphasis added.)

See United States v. *Giordano*, 416 U.S. 505; *United States* v. *Chavez*, 416 U.S. 562.

Petitioner's contention that the decision below presents an "issue of grave and serious national importance" and a "potential restriction of significant magnitude to this nation's ability to protect its sovereignty" is belied by the historical position of the Executive (see note 9, *supra*) and the position taken by the Department of Justice in its *amicus curiae* memorandum in the court below. The Department said:

> It is the position of the Department of Justice that such activities must be very carefully controlled. There must be solid reason to believe that foreign espionage or intelligence is involved. In addition, the intrusion into any zone of expected privacy must be kept to the minimum and *there must be personal authorization by the President or the Attorney General.* The United States believes that activities so controlled are lawful under the Fourth Amendment.

Moreover, this bizarre and unique case, involving as it does an extra-statutory, *ad hoc* group of government agents rather than a regular intelligence agency, hardly presents an appropriate case for review by this Court.

II. NONE OF THE REMAINING ISSUES WARRANTS REVIEW

A. Pre-Trial Publicity

Petitioner's contention is essentially that the trial judge failed to conduct a "meaningful" voir dire in light of the pre-trial publicity (Petition, p. 27). The court of appeals' careful review of the transcript of the voir dire examination, however, confirms that the trial judge "adequately probed the question of prejudice and enabled the defendants to ascertain—within limits of reasonableness, and necessary adequacy—what the prospective jurors had heard about the case and the extent to which they might have made preliminary determinations about guilt or innocence" (Pet. App. a11-12, n.8). Significantly, counsel were invited by the judge to propose additional questions to venireman, who were questioned individually *in camera* about pre-trial publicity, and petitioner's counsel did not suggest any further inquiry. Indeed, he expressly commended the judge on the manner in which the voir dire was being conducted.

The court of appeals' summary of the results of the voir dire also shows that there was no "pattern of deep and bitter prejudice" and, thus, that the voir dire was sufficient to discover and excuse any venireman who might not have been able to "lay aside [any] impression or opinion and render a verdict based on the evidence presented in court." *Irvin* v. *Dowd*, 366 U.S. 717, 723, 727. *See also*,

Murphy v. *Florida*, 421 U.S. 794; *Beck* v. *Washington*, 369 U.S. 541. As the court said (Pet. App. a11, n.8):

> . . . The voir dire revealed that the array as a group neither was generally aware of the facts of the break-in nor had formed opinions about the defendants. A panel of approximately 120 veniremen was questioned about publicity; all thirteen who indicated they had an unfavorable opinion about the defendants were excused.
>
> As to the jurors selected to serve none had expressed an opinion about the defendants' guilt, although one had heard that there had been a break-in by someone and another heard that Ehrlichman was "involved" (Tr. 394-97). Few of the jurors selected had more than a faint awareness of the Fielding. Ellsberg matter, and none expressed any particular interest in Watergate. None were challenged for cause by the defendants."

B. Discovery

The court of appeals' detailed factual analysis of petitioner's claims that he was denied discovery rights fully disposes of those claims (Pet. App. a40-45). The short answer is that petitioner, who had full access to all his files at the White House, was provided copies of all documents that he specifically identified that were material to his defense. His contention that he was deprived of the opportunity to demonstrate that he was denied specific evidence was found to be "groundless" by the court of appeals

after a careful review of the transcript (Pet. App. a40-41, n.96). Moreover, the trial judge repeatedly emphasized that he would enforce subpoenas for specific items shown to be relevant and admissible, including documents in the so-called "Leaks" file.[11] *See generally, United States* v. *Nixon*, 418 U.S. 683, 697-700; *Bowman Dairy Co.* v. *United States*, 341 U.S. 214.

With respect to petitioner's claim that he was deprived of the right to the assistance of counsel in examining certain privileged White House papers, the court of appeals concluded that petitioner could himself review all privileged documents and could consult freely with counsel about any documents and that there was no showing that his counsel was impeded in securing sufficient information to frame necessary subpoenas *duces tecum*. Counsel's presence at defendant's side is not required at any stage where there is but a "minimal risk that [his] counsel's absence . . . might derogate from his right to a fair trial." *United States* v. *Wade*, 388 U.S. 218, 228. *See also, United States* v. *Ash*, 413 U.S. 300, 313-15.

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[11] Contrary to petitioner's suggestion (Petition, p. 29), the government never contended, nor did Young testify, that petitioner had destroyed documents subsequently found in the "Leaks" file. The government's contention was simply that certain incriminating documents had been removed from Young's files by petitioner and even later found in a file of petitioner's papers labeled "Leaks". It was undisputed that the documents were found in that file. Production of the file itself or the rest of its irrelevant, but classified documents was plainly not pertinent to any disputed issue.

C. Severance

Petitioner does not contend that the court of appeals applied an erroneous standard in affirming the district court's refusal to sever him. Nor could he. The court of appeals followed a well-established and uniform line of authority that severance is required only where the conflict of defenses is so prejudicial that the differences are irreconcilable. Rather, petitioner challenges the court's factual determination that the record did not reflect any irreconcilable conflict. This conclusion hardly warrants review by this Court, particularly in light of the analysis of the court below which conclusively demonstrates that there is no basis for a finding that the district judge abused his discretion. *See, e.g., Opper* v. *United States*, 348 U.S. 84, 95.

Moreover, there is no conflict between the decision below and *De Luna* v. *United States*, 308 F.2d 140 (C.A. 5). *De Luna* did not hold that severance is required whenever one defendant may wish to comment on another's refusal to testify. In *De Luna*, two defendants tried jointly each maintained the other was solely responsible, and the importance of one defendant's comment on the silence of the other was overriding. Here, there was no such inconsistency of defenses, a distinction which precludes application of the *De Luna* rule. *See United States* v. *Hines*, 455 F.2d 1317, 1334 (C.A.D.C.), *certiorari denied*, 406 U.S. 975; *United States* v. *Roselli*, 432 F.2d 879, 902 (C.A. 9), *certiorari denied*, 401 U.S. 924.

D. Interrogatories to the President

The court of appeals properly held that, if a subpoena *duces tecum* addressed to a President only may be enforced where there is a "demonstrated, specific need" for the evidence or where the evidence is "essential to the justice of the [pending criminal] case," *see United States* v. *Nixon*, 418 U.S. 683, 713, a more burdensome subpoena *ad testificandum* can be justified only where there is at least as compelling a showing (Pet. App. a45). *See United States* v. *Burr*, 25 Fed. Cas. 30, 34 (No. 14,692d) (C.C. Va.). There was and could be no such showing where petitioner did not assert that the President had personally approved or directed the entry and search.

Petitioner's claim that he was prejudiced by the district judge's refusal to propound his interrogatories, instead of those prepared by the judge, is fully answered by the court of appeals (Pet. App. a46):

> [A]s to the detailed interrogatories submitted by Ehrlichman, we find, as did the District Court, that many of the questions were repetitive or irrelevant to the issues properly before the court. The court drafted concise questions addressed to the central issues of the Ehrlichman submission and the President answered these. Ehrlichman contends, however, that the court's interrogatories were inadequate to explore the issue whether concealment of the activities of the "Room 16" unit was undertaken pursuant to Presidential order, to protect highly classified information, or whether such concealment was intended instead to mask wrongdoing. Our comparison of the interrogatories submitted by the defendant and those formulated by the court on this issue lead us to reject this contention. It appears highly unlikely that the President's answers would have differed in any significant respect had Ehrlichman's submission been adopted. Moreover, the President's response to the court's interrogatories revealed that he would have had little useful testimony to give on the question of concealment—even assuming the relevance of that question to the issues at trial—if he had been called to testify in person.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES F. C. RUFF
Special Prosecutor
Watergate Special Prosecution Force
315 9th Street, N.W.
Washington, D.C. 20530

PHILIP B. HEYMANN
PETER M. KREINDLER

Special Assistants to
the Special Prosecutor

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